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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA,

Petitioners,

vs.

ANTONIA ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA,

Petitioners,

vs.

ANTONIA ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The "Arizona," Antone Mardesich and wife, and Peter Mardesich and wife, and General Casualty Co. of America, respectfully petition the Court to issue a Writ of Certiorari to the Supreme Court of the State of Washington, requiring that there be certified to this Court for determination by it that certain cause in which the petitioners were appellants and respondent herein was respondent;

being Cause No. 25626 in said Supreme Court of the State of Washington, for the following reasons:

The Supreme Court of the State of Washington has decided in this cause a material and substantial question of law arising under the Jones Act (sec. 33 of Act of Congress of June 5, 1920, 41 Stat. 1007, 48 U. S. C. A. 688) in a way not in accord with the majority of the decisions of the Federal Circuit and District Courts; that the question has not been passed upon or decided by this Court; and that upon such question the decisions of the Circuit and District Courts are in conflict and cannot be reconciled.

The Supreme Court of the State of Washington has decided in this cause two material and substantial questions of admiralty law in conflict with the applicable decisions of this Court and of the lower Federal Courts.

The Supreme Court of the State of Washington has decided in this cause a material and substantial question of law arising under the Jones, or Merchant Marine Act (41 Stat. 1007, 48 U. S. C. A. 688) in a way not in accord with the applicable decisions of this Court.

Said Supreme Court of the State of Washington is the highest Court of that State in which a decision upon such questions could be had.

A.

Summary of Matter Involved.

Antone Mardesich was the owner and his son, Peter Mardesich, was the master of the purse seine fishing vessel "Arizona" during the season of 1933. Mario Anelich, plaintiff's decedent, was a member of the crew of the "Arizona" during that season, serving as winchman, or winch tender. The fishing was done in the waters of Puget Sound.

He was injured during the pursing in, or drawing together and raising, of the net by the winch, receiving an extensive open fracture of his left leg.

The work he was doing and the equipment he was using at the time of his accident were entirely familiar to him. He was an experienced fisherman and winchman and prior to his accident on August 1, 1933, he had assisted in hauling in the net, using the same method of operation and the same equipment, approximately one hundred and fifty times during the 1933 fishing season (R. 234, 235, 293, 307). He received his injury when his leg became entangled in a line which he alone handled and was drawn into the winch (R. 235, 295, 309).

As soon as his peril was seen, the winch was stopped and he was extricated, a tourniquet being placed upon his leg by the members of the crew (R. 306, 308, 312-313, 267). He was transferred to the fastest boat available and taken to the nearest medical attention, at Friday Harbor on the opposite side of San Juan Island from that where the "Arizona" was fishing (R. 82, 253, 254, 317). Enroute a telephone call was placed to the Coast Guard and the cutter of the Coast Guard picked him up that afternoon and took him to the Marine Hospital at Seattle, Washington (R. 254, 264).

He was injured at about 8:30 o'clock A. M. He arrived at Friday Harbor at about 10:30 A. M., and Dr. Sturdevant immediately cleansed and repaired the wound and made him as comfortable as possible (R. 260-261). The cutter arrived at 5:00 P. M., and took him to Seattle where he was received at the Marine Hospital at about 10:30 that evening and put to bed. No operative measures of any kind were taken until the next morning, at which time the leg was set and a cast applied (R. 160, 165). Two or three days

later, a general systemic poisoning became apparent and he died on August 8, 1933, his death being due to septicemia, or blood poisoning (R. 154, 156). These facts are undisputed. References to the record for testimony relevant to the questions herein raised, are made subsequently throughout this petition and the supporting brief.

This action was instituted, under the Jones Act, in the Superior Court of the State of Washington, alleging as the acts of negligence relied upon: That the machinery and equipment which Anelich used was old, worn out, defective, dangerous and unseaworthy; that the place where he was ordered to work and equipment he was ordered to use were defective and dangerous; that no one was in the engine room of the vessel at the time the accident occurred and that due to the defective condition of the machinery, and more particularly the clutch on the winch, the winch could not be shut off on deck; that the consequent delay in shutting off the winch caused the injury. Further, that after the accident the defendants were negligent in their treatment and care of the injured man in not taking him to some other port, or in not calling an airplane to take him to the Marine Hospital in Seattle; and that as a consequence of such negligent treatment, blood poisoning developed, causing his death; that had the defendants not been negligent in such treatment, blood poisoning would not have developed (Complaint. Paragraphs VII, VIII, IX, R. 3-5).

The defendants denied that they were negligent in any respect charged and alleged that the accident was due solely and proximately to the negligence of Anelich and that his injury was due to risks naturally incident to his employment, which were open, obvious and apparent to him and therefore assumed by him as a part of his employment (Answer, R. 8-10).

The trial court refused to grant a non-suit or direct a verdict for the defendants either on the basis of assumption of risk, or of failure to prove negligence proximately causing Anelich's death. As to assumption of risk, the Court stated that in this action, brought under the Jones Act, there could be no assumption of risk of injury as to any defective appliance or unseaworthy quality of the vessel (R. 201, 348, 364). The Trial Court further permitted the jury to decide the issue of negligent treatment (Instruction No. 7, 8, R. 355) and all other questions in the case.

There was a verdict for the Respondent, upon which judgment was entered. On appeal the judgment was affirmed by the Supreme Court of Washington (83 Wash. Dec. 429, 49 Pac. (2) 3, R. 18-24).

B.

Reasons Relied on for Allowance of Writ.

The rulings of the Supreme Court of the State of Washington, of which your petitioners complain and which form the basis for this petition are:

1. In refusing to allow to the defendants the defense of assumption of risk in this action under the Jones Act, and in refusing to hold as a matter of law that Anelich assumed the risk of his injuries;

2. In failing to hold that there was no evidence of negligence on the part of defendants proximately causing the injury of Anelich;

3. In failing to hold that defendants were not negligent in the treatment and care of the injured man;

4. And in allowing the jury to speculate as to whether the negligent treatment, if any, of the injured man caused the blood poisoning resulting in death.

No. 1 presents the question, not yet decided by this Court, of whether the defense of assumption of risk is ever available in an action by a seaman against the owners or master of a vessel, when the seaman alleges that his injuries are due to a defective appliance or to some "unseaworthy condition" of the vessel.

It is conceded that a seaman assumes the ordinary and usual risks of his employment under the Jones Act, *The Cricket,* 71 F. (2) 261 (C. C. A. 9, 1934); *Johnson* v. *U. S.,* 74 F. (2d) 703 (C. C. A. 2, 1935), as well as under the maritime law. *The Iroquois,* 194 U. S. 240, 24 R. C. L. 1171.

It is stated by the Supreme Court of Washington, however, that under neither the maritime law nor the Jones Act can the defense be asserted if an unseaworthy condition is alleged as a cause of the injury—that a seaman, no matter how willingly and eagerly he uses the appliance, with full knowledge of its condition and without compulsion, by order or otherwise, cannot be said to have assumed the risk of injury therefrom.

The decision on this question in actions brought under the Jones Act, making applicable to seamen all the provisions of the Federal Employers' Liability Act, has resulted in apparent conflict between the Federal Circuit and District Courts. *This conflict has never been put at rest by a decision of this Court.* The majority of the courts passing upon the question have construed the Act as providing the seaman with the rights of a railroad employee, and subjecting one who sues thereunder to the same disabilities, including that of being held to assume the ordinary risks inherent in the employment as well as such extraordinary risks, even though created by his employer's negligence, as are open and obvious or are fully known to and appreciated by him. Such courts regard the action,

even though defective equipment is alleged, as based upon *negligence* in the common law sense, and the common law defenses to such an action, except so far as expressly removed by act of Congress, are regarded as applicable. *Southern Railway Co.* v. *Hermans*, 44 F. (2d) 356 (C. C. A. 4, 1930); *M. J. McCahan Sugar Etc. Co.* v. *Stoffel*, 41 F. (2d) 651 (C. C. A. 3, 1930); *Hunt* v. *Hobbs, Wall & Co.*, 42 F. (2d) 437 (C. C. A. 9, 1930); *The Calvert*, 51 F. (2d) 494 (C. C. A. 4, 1931); *The Richelieu*, 48 F. (2d) 497 (C. C. A. 4, 1931); *Stevens* v. *O'Brien & Co.*, 62 F. (2d) 633 (C. C. A. Mass. 1933); *Peterson* v. *Sanford Tug Co.*, 28 F. (2d) 283 (D. C., N. Y. 1928); *The Ipswich*, 46 F. (2d) 136 (D. C., Md. 1930); *The Zealand*, 49 F. (2d) 781 (D. C., N. Y. 1931); *Russell* v. *Pere Marquette Ry. Co.*, 245 Mich. 649, 223 N. W. 230 (1930) Cert. Den. 279 U. S. 864; *Patterson* v. *Cleveland Cliffs Iron Co.*, 27 Ohio App. 316, 174 N. E. 592 (1930); *McGinn* v. *North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113 (1928).

The Circuit Court for the Second Circuit has announced in several cases, however, that in an action under the Jones Act there can be no assumption by the seaman of risk of injury from any defective appliance, which might be said to render the vessel unseaworthy. *Grant* v. *U. S. Shipping Board Emergency Fleet Corp.*, 22 F. (2d) 488 (C. C. A. 2, 1927); *Howarth* v. *U. S. etc. Corp.*, 24 F. (2d) 374 (C. C. A. 2, 1928); *Ives* v. *U. S. etc. Corp.*, 58 F. (2d) 201 (C. C. A. 2, 1932).

To the same effect is *Grimberg* v. *Admiral Oriental S. S. Line*, 300 Fed. 619 (D. C., Wn. 1924). The conflict between the Circuits as herein set forth was recognized in *Pittsburgh S. S. Co.* v. *Palo*, 64 F. (2d) 198 (C. C. A. 1933) and the Court approved the decisions from the Second Circuit, as a matter of pure *dicta*.

The Second Circuit has recently cast doubt upon the ruling which previously was stated as positive law, and

has indicated that the question here raised is an open one even in that jurisdiction. *Scheffler* v. *Moran Towing & Transport Corp., Inc.*, 68 F. (2d) 11 (C. C. A. 2, 1933).

At Maritime Law, aside from the Jones Act, assumption of risk of obvious dangers has been held an available defense, even though such dangers were due to defective machinery or equipment. *The Serapis*, 51 Fed. 91 (C. C. A. 4, 1892); *The Saratoga*, 94 Fed. 221 (C. C. A. 2, 1899); *Cunard Steamship Co.* v. *Smith*, 255 Fed. 846 (C. C. A. 2, 1918); *The Maharajah*, 40 Fed. 784 (D. C., N. Y. 1889); *The Luckenbach*, 53 Fed. 662 (D. C., N. Y. 1892); *The Scandinavia*, 156 Fed. 403 (D. C., Md. 1907) and see *Globe S. S. Co.* v. *Moss*, 245 Fed. 54 (C. C. A. 6, 1917); *Contra*, *Storgaard* v. *France & Canada S. S. Corp.*, 263 Fed. 545 (C. C. A. 2, 1920).

A question of first impression in this Court and of vital importance to every ship owner, and to every seaman, stevedore, harbor worker and fisherman, is presented by this case. It is evident that the Circuit Courts are in conflict. That conflict can only be resolved into certainty by this Court's decision as to whether under the Act of Congress herein termed the Jones Act, and the Federal Statutes thereby made applicable to seamen, the defense of assumption of risk is available to the seaman's employer to the same extent as it is to a railroad employer. This defense, and a right given them by act of Congress, has been denied your petitioners by the Courts of the State of Washington (R. 18, 19; Page 290).

It is conceded that a seaman directly ordered to use defective equipment does not assume the risk of injury therefrom; he has no choice but to obey, or be punished for his disobedience. Here, however, Anelich was no more under compulsion than any shore worker; he was subject to no disciplinary action for disobedience, and could quit at any

time, with daily opportunity to do so, and receive his earned share of the catch (R. 326-328). Under such circumstances, even the Second Circuit would allow the defense of assumption of risk as to open and obvious defects, though caused by the master's negligence; all reason for any difference between the maritime and common law rules is removed. *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing and Transportation Co.*, 68 F. (2d) 11; *Johnson* v. *United States*, 74 F. (2d) 703.

II.

It was the theory of the plaintiff's case that the clutch transmitting power to the winch was so worn out and defective that it would not stay engaged unless the clutch lever was braced or locked in position by a stick, forked at one end and resembling a boot jack, which hung beside the winch on a string (R. 240). The argument proceeded that because the stick was in place the lever could not be thrown in to stop the winch and that by reason of the delay in stopping the winch Anelich, after he became entangled in his line, was pulled into the winch. In support of this theory evidence was introduced as to the existence of the stick and the worn condition of the clutch (R. 106, 130, 337). *There was no evidence that the stick was in place on this occasion.*

Men experienced in marine engineering testified that the clutch required nothing to keep it in mesh when the winch was under a load, such as the purse line, as a result of their examination and actual use of the machine (R. 193, 206, 221). There was further testimony that it was common to use such a stick when a winch was to operate steadily for a considerable time under a light load, as under those conditions such a clutch tends to shake and gradually slide out of engagement (R. 209, 240, 291, 298). *Fur-*

ther, there was positive testimony by the crew that the stick was not used when the purse line was being hauled in and that it was not in place at the time of this accident (R. 88, 236, 296.

On this uncontradicted testimony, what evidence is there on which the jury could find that any negligence on the part of the defendant contributed to the injury? The stick was not in place, so that is eliminated. The clutch was somewhat worn and the jury might be entitled to find that under certain circumstances it would eventually disengage—but on this occasion it did not disengage and Anelich was injured because the winch continued to turn. The winch drum revolved at least 90 R. P. M. (R. 223) and it was stopped almost instantly by the engineer below, who heard the shouting (R. 191, 236, 295, 308, 312, 315).

Only by speculation and guess in the face of direct testimony could the jury infer that the stick was in place at the time of the accident. In its absence there is absolutely no evidence of negligence on the part of the defendants contributing to the injury, and under the rule as laid down by this Court in *Northwestern Ry. Co.* v. *Page,* 274 U. S. 65; *Toledo, St. L. & W. R. R.* v. *Allen,* 276 U. S. 165; and *N. Y. Cent. R. Co.* v. *Ambrose,* 280 U. S. 486, the verdict cannot be sustained.

III.

At the trial and on appeal the Petitioners contended that there was no evidence that they were negligent in their treatment of the wounded man or in the course of conduct followed in securing medical attention for him. These are duties imposed by the maritime law on every master and owner of a vessel, and is governed by the law as laid down by this Court in *The Iroquois,* 194 U. S. 240. Failure to carry out these duties constitutes negligence, as

that term is used in the Jones Act. *Cortes* v. *Baltimore Insular Lines*, 287 U. S. 367.

The undisputed evidence, in short, showed that Anelich was immediately transferred to the fastest boat available (R. 82), and made as comfortable as possible (R. 275 and reached competent medical treatment within two hours after the accident, at least an hour before he could have reached such attention had the master of the vessel adopted any of the other courses suggested by counsel for the plaintiff. At the first possible moment telephone conversation was had with the Coast Guard (R. 254), the usual means of transporting injured seaman (R. 24), and by that means Anelich was taken to the hospital in Seattle. It appeared clearly that when medical attention to halt bleeding and infection has been given to such a wound, it is necessary to allow the patient to rest for a considerable period to recover from shock, and that that was done in this case; when he reached the Marine Hospital in Seattle nothing of an operative measure was done until the following morning (R. 160, 165).

The Master and crew of the "Arizona" made no effort to cleanse or repair the wound other than to apply a tourniquet to halt bleeding. Had they done so, without having special training and with only a small first aid kit, it appeared that the likelihood of infection and of greater shock would have been increased (R. 269, 271, 274, 260, 265).

Evidence was admitted over objection as to other possible ports to which he might have been taken, all of which were further away than Friday Harbor, and as to the available airplane service at Seattle (R. 168). By the use of the latter Anelich might have reached the Marine Hospital within three or four hours after the accident, but his immediate need was competent medical attention to his wound, to halt bleeding and infection, and this would have been delayed by following such a course.

Delayed medical treatment and primitive first-aid methods are among the risks a seaman assumes. Clearly the duty the State Court permitted the jury to impose upon the defendants far exceeded that imposed by the Maritime Law as defined by this Court in *The Iroquois,* 194 U. S. 240, of reasonable care and judgment on the part of the master of the vessel under the circumstances. There were other courses of conduct which the defendants might have followed; but only the exercise of reasonable judgment is required, and to hold fishermen on a small boat to a duty as high as that required of the master of a large vessel, trained in first aid and with wireless communication with the shore, is at variance with the law as above stated.

IV.

It has been at all times contended that even if it be assumed that the fishermen should have attempted to cleanse and repair such a wound, or should have known of and called airplane service, yet there is no evidence that the treatment actually given was a proximate cause of the septicemia resulting in death. To charge such results to such treatment is purely speculative and under the law laid down by this Court, a jury's verdict may not rest upon conjecture and speculation. *Chicago, Milwaukee & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478; *N. Y. Cent. R. Co.* v. *Ambrose,* 280 U. S. 486.

The testimony of each of the four doctors who testified was that in his opinion the organisms which resulted in septicemia causing death entered the wound at the time of the original injury (R. 160, 162, 165, 262, 267, 270, 273). It is undisputed that from such a wound it is extremely likely that septicemia will result under the best of treatment—that septicemia was the most probable result of the injury Anelich received, even if he had been hospitalized

immediately (R. 267, 269). The case is very similar to that of *Cortes* v. *Baltimore Insular Line*, 66 F. (2d) 526 (C. C. A. 2, 1933) in which it was held that in absence of evidence showing with reasonable certainty that defendants' neglect caused the seaman's death, the jury could not return a verdict against the defendants.

There was no evidence on which the jury could do other than speculate as to whether negligent treatment, if any, was the proximate cause of septicemia, as it appeared that with the best imaginable treatment, the chances were that septicemia would result from such a wound. To allow a verdict to rest upon speculation and conjecture of this character is at variance with the law as laid down in *Chicago, Milwaukee & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 478 and other cases cited *supra*, and with the well-reasoned decision of the Second Circuit in *Cortes* v. *Baltimore Insular Line*, 66 F. (2d) 526.

By the verdict based on the rulings of the state court, the defendants are charged with responsibility for a man's death from blood poisoning because of alleged negligent treatment, when it clearly appears that in all probability blood poisoning was the inevitable result of a wound of this character, regardless of treatment or hospitalization. The jury is allowed to speculate in the face of all the medical testimony and to find that had different treatment been given blood poisoning would not have resulted, without any evidence whatsoever upon which to base that finding.

WHEREFORE petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Washington, commanding said Court to send to this Court, on a day certain to be therein designated, a full and complete transcript of record of all its proceedings in said cause, to the end that

the cause may be reviewed and determined by this Court, as provided by law, and that the judgment of the Supreme Court of the State of Washington in this cause may be reversed by this Court.

THE "ARIZONA",
ANTONE MARDESICH AND WIFE,
PETER MARDESICH AND WIFE,
GENERAL CASUALTY CO. OF AMERICA,
By RALPH S. PIERCE,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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ANTONIA ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED.

BRIEF IN SUPPORT OF PETITION.

Opinion of Court Below.

Supreme Court of the State of Washington: *Anelich* v. *The Arizona et al.*, 49 Pac. Rep. (2d) 3 (R. 18-24).

Basis of Jurisdiction.

The date of judgment of the Supreme Court of the State of Washington sought to be reviewed is October 25, 1935 (R. 25).

The action is one in which rights are claimed by the respondent, plaintiff in the court below, under the Jones, or

the Merchant Marine Act (41 Stat. 1007; 48 U. S. C. A. 688). In the trial court, petitioners by motion for non-suit at the close of the plaintiff's case (R. 200) and by motion for directed verdict at the close of all the evidence in the case (R. 348-351), and by motion for judgment notwithstanding the verdict (R. 13), asked for judgment in their favor upon the ground that under the provisions of the Jones Act, and the Federal statutes by it made applicable to injured seamen, as construed in *Seaboard Air Line* v. *Horton,* 233 U. S. 492; *Delaware, etc., R. R.* v. *Koske,* 279 U. S. 70, the plaintiff's decedent assumed the risk of injury as the injury resulted from an open, obvious hazard, incidental to his employment; and upon the further ground that in this action there was no proof of negligence on the part of the defendants proximately causing the injury to plaintiff's decedent, and that a verdict may not rest upon conjecture and speculation, under *Chicago, M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472; *Northwestern Ry. Co.* v. *Page;* 274 U. S. 65; *Toledo, St. L. & W. Ry.* v. *Allen,* 276 U. S. 165; *N. Y. Cent. R. Co.* v. *Ambrose,* 280 U. S. 486; and upon the further ground that under said act and under the maritime law as laid down in *The Iroquois,* 194 U. S. 240, there was no proof of negligence in the treatment and care afforded the injured man following his injury; and upon the further ground that the verdict that the septicemia or blood poisoning resulting in death was proximately caused by the negligent treatment, if any, of the injured man rested only upon guess and speculation in the face of all the medical testimony, and hence cannot be sustained, upon the authority of *Chicago, M. & St. P. Ry.* v. *Coogan,* and the other cases cited, *supra.*

These motions were overruled. The instruction requested by the defendants upon the question of assumption of risk (R. 12) was refused. Judgment was entered in

the trial court against Petitioners (R. 15). This judgment was affirmed by the Supreme Court of the State of Washington (R. 18-24). Thereafter petition for rehearing was denied (R. 25) and judgment of the Supreme Court of the State of Washington entered October 25, 1935 (R. 25).

Statement of the Case.

Mario Anelich asked for and received employment from Antone Mardesich in the spring of 1933 as fisherman on the latter's purse seine fishing vessel "Arizona" for the coming fishing season (R. 318). Peter Mardesich, the son of the owner, was master of the vessel. Anelich was an experienced fisherman, had followed that work for many years, and had owned his own boat (R. 77, 78, 234, 306, 318). The fishing was on shares, each man receiving one share, and the boat and net four (R. 233-234).

About June 27, 1933, fishing operations began (R. 234). Each member of the crew of eight was assigned definite duties, and Anelich was assigned to tend the rear winch, as he had tended the winch on the boat where he had worked the year before and was an experienced winchman (R. 234, 306). Anelich worked on the rear winch throughout the season until he was injured, and the operation of casting out the net, pursing it and drawing it in with the winch (making a "set") had been performed about 150 times prior to his injury. The operation was always made in the same way (R. 234-235, 293, 307).

As winchman, Mr. Anelich was in charge of the rear drum of the double winch and of the purse line which was hauled in by it; George Brajcich was in charge of the other purse line on the forward drum. The line was taken several turns around the drum, and as the drum revolved the winchman created friction by pulling on the free end of the

line. As the line came in he coiled it behind him. The pulling in of the lines pulled the bottom of the net together, and formed a sack or purse, enclosing the fish. When the net was pursed and had been brought to the surface, the weight of the net was taken on block and tackle from the boom or derrick (R. 56, 230, 294) and it was then the duty of the winchman to clear his respective purse line away from the drum of the winch and from the blocks on the davit on the side of the vessel, so that the net could be lifted above the deck. Throughout this operation the winchmen were in complete control of their respective purselines; no one handled the line on the rear drum of the winch except Anelich (R. 235, 295, 309).

The accident occurred on August 1, 1933, at about 8:30 A. M., while the "Arizona" was fishing along the east side of San Juan Island in Puget Sound, just after the weight of the net had been taken from the purse lines onto the boom (R. 81, 252, 299). His shout of pain was the first intimation that any of the crew near him had that anything was wrong. The winch was halted immediately by the engineer below, who was warned by the shouts of Anelich and the other members of the crew (R. 80, 188, 307, 308, 312, 315). George Brajcich, who handled the forward drum and purse line, seized an axe and cut the aft line, freeing Anelich, who had been caught by the left leg, and then put a tourniquet around his leg above the knee (R. 294-295). He was then transferred to another vessel, the "Congress" by a skiff, as the "Arizona" was completely surrounded by her nets and corks and could neither move nor allow another boat to come alongside without danger of fouling propellors in the nets and disabling one or both vessels (R. 50, 237, 316). The "Congress" was directed to take him to Friday Harbor, on the other side of the island, to the nearest doctor at once. As the "Congress" started to pull away, a fish buyer,

the "Excel II," was seen and as it was a much faster boat (R. 253), Peter Mardesich directed that the injured man be put on board her and taken to the nearest doctor (R. 82, 254, 317). Then the crew of another ship aided those of the "Arizona" to lift her net and the "Arizona" followed at top speed to Friday Harbor (R. 238).

Aboard the "Excel II" was Lee Mackovich, head buyer of the Packing Corporation. He jumped upon a float as the vessel passed Mitchell Bay, about fifteen minutes run from the scene of the accident, directed the captain to proceed at top speed to Friday Harbor, went ashore and walked the necessary quarter of a mile to the nearest telephone. He called the Everett office of his company, on the mainland and directed Morris at that office to call the Coast Guard and have the Coast Guard cutter pick up the injured man at Friday Harbor (R. 254). That call was completed at 9:40 A. M., standard time. The accident had happened at about 8:30 A. M. At ten o'clock the call was completed to the Coast Guard at Port Townsend (R. 290), and the Coast Guard was notified that an injured man from a fishing vessel should be picked up and transported to Seattle to the Marine Hospital at once (R. 289, 322, 323).

At about 10:30 the "Excel II" arrived in Friday Harbor and Dr. Sturdevant was called. He examined the wound, cutting away the trouser leg and exposing it for the first time and then bandaged it hastily and transported the injured man to his office where he did the necessary work of cutting away the dead tissues, sewing up torn muscles and the skin, and bandaging the wound (R. 260). He made no effort to set the broken bone.

Meanwhile the "Arizona" had arrived in Friday Harbor. The officers and crew had been assured both at Mitchell Bay and at Friday Harbor that the Coast Guard was on its way to pick up the injured man (R. 288), and that the cutter

would arrive at noon. When the cutter did not arrive, Peter Mardesich called again at 12:55 o'clock standard time, and Dr. Sturdevant made a third call at 1:08 o'clock (R. 280). In response to these calls the Coast Guard picked up Mr. Anelich at 5:00 P. M., and he was taken ashore at the Marine Hospital in Seattle at 10:45 that evening. He was placed in bed and no operative measures of any kind were taken until nine o'clock the next morning (R. 160, 165). Two or three days later systemic infection developed (R. 154). But for the development of septicemia, or blood poisoning, he would have recovered and had a fairly walkable leg (R. 158). Because of it, however, his condition grew steadily worse and on August 8, 1933, a week after the accident, he died.

The winch in question was located about midship, and on the starboard side of the winch, between the two drums, was a lever by which the clutch of the winch was engaged and disengaged from the main drive shaft. The winchmen stood on the starboard side of the winch, Brajcich slightly forward and Anelich slightly aft of the winch (R. 55, 86). Attached to the winch by a string hung a forked stick, designed to be placed behind the clutch handle to hold it out, in engagement, when the winch was to be used for some little time in stormy weather or without a heavy load (R. 209, 240, 291, 298); it was never used when there was a load, such as the purse line, on the winch and *it was not in place on the day in question,* according to the testimony of the members of the crew (R. 88, 236, 296). The clutch consisted merely of two square jaws, one of which slid into mesh with the other, and if run for a time without a load, would naturally tend to shake apart and disengage. The evidence as to the condition of the clutch was in conflict; considerable testimony was given as to its worn condition, which plaintiff contended would not allow the winch to

operate without some means of actually holding it in engagement (R. 106, 130, 337). The members of the crew, as well as mechanics who had examined and tested the clutch, testified that nothing was used or needed to keep the clutch in gear while the winch was loaded (R. 236, 296, 193, 206, 221, 291, 88), and that the clutch, while not a new one, was in good working condition (R. 193, 206, 221).

Such are the material facts of the case.

The pleadings and the rulings of the courts on the trial and appeal of the case are set forth in the petition under heading "A", and in the interest of brevity will not be repeated here.

Specifications of Error.

1. The Supreme Court of Washington erred in holding that the defense of assumption of risk was not available to the defendants in this action.

2. The Supreme Court of Washington erred in failing and refusing to hold that there was insufficient evidence of negligence proximately causing Anelich's injury to sustain the verdict of the jury.

3. The Supreme Court of Washington erred in failing and refusing to hold that there was insufficient evidence of negligent care and treatment to sustain the jury's verdict.

4. The Supreme Court of Washington erred in failing and refusing to hold that there was no evidence upon which the jury could find that the negligent care and treatment, if any, was the proximate cause of the disease causing the death of Anelich.

Argument.

A. The decision below, holding that assumption of risk is not available to the defendants in this action, decides an

important question of maritime and Federal law, not yet decided by this Court, in a way contrary to and in conflict with the great majority of prior Federal and State decisions and relies only upon cases from the Second Circuit, which state a conflicting, questioned and minority rule.

B. The decision below is contrary to and in conflict with prior Federal and State decisions in allowing the jury to guess and speculate, and to return a verdict against the defendants based upon such conjecture, without substantial proof of negligence on their part,

1. Contributing proximately to the original injury suffered by Anelich,

2. In the care and treatment afforded the injured man, or

3. Contributing proximately to the septicemia ultimately causing his death.

Further, that the decision holds the defendants to a higher degree of care and skill in their treatment of the injured man than that required by the maritime law stated by this Court in *The Iroquois*, 194 U. S. 220, and by other Federal Decisions.

A.

The statute under which this action is brought, herein referred to as the Jones Act, is as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees, shall apply; and in case of the death of any seaman as the result of any such personal injury, the personal representative of such seaman may maintain

> an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. * * *'" (41 Stat. 1007, 48 U. S. C. A. 688.)

The statutes referred to by the Jones Act as made applicable to the seamen are the relevant portions of the Federal Employers' Liability Act (35 Stat. 65; 45 U. S. C. A. 51-59) which provide, in short, that an employee of a common carrier by railroad may recover damages, or in case of his death his personal representative may recover damages, for injuries or death resulting in whole or in part from the negligence of any of the employees of such common carrier or by reason of any defect or insufficiency due to the neglect of the employer in its equipment; that the contributory negligence of the employee shall not bar recovery but shall diminish the amount of the recovery in the proportion to the amount of negligence attributable to the employee; that the employee shall not be held to have assumed the risk where violation by the employer of a safety statute contributed to the injury; and that the defense of fellow servant cannot be available to the master.

This Court has construed the Federal Employers' Liability Act as abolishing the defense of assumption of risk only when a Federal safety statute has been violated, and in all other cases the defense exists as at common law. *Seaboard Air Line* v. *Horton,* 233 U. S. 492; *Jacobs* v. *Southern Railroad Company,* 241 U. S. 229; *Delaware Etc., Co.* v. *Koske,* 279 U. S. 7; *Northwestern Pacific Ry. Co.* v. *Bobo,* 290 U. S. 499. The law as stated in the *Seaboard Air Line Case* is as follows:

> "Some employments are necessarily fraught with danger to the workman; danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are

presumably taken into account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. *But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.''* (Italics ours.)

This Court has never had before it the question here presented, as to whether or not the law as stated in the cases just referred to applies to seamen in an action brought under the Jones Act against his employer. The court below held that neither at maritime law prior to the Jones Act, nor under the Jones Act, did the seaman assume the latter type of risk referred to in the *Seaboard* case and underlined by us. It is our contention that on both points the Supreme Court of Washington was in error.

This Court has had the Jones Act under discussion upon several occasions, but in none of these decisions is there any indication that the defense does not apply with equal force to seamen and shore workers alike.

The first case involving the Act was *Panama Railway Co.* v. *Johnson,* 264 U. S. 375, in which the constitutionality of the Act was passed upon and in which it was said that the statute brought into maritime law new rules drawn from the common law as modified by the Federal Employers' Liability Act. This language is carried on in *Engel* v. *Davenport,* 271 U. S. 33, in which it was said that the action under the Jones Act is based upon negligence and the following language was used:

> "Here the complaint contains an affirmative averment of negligence in respect to the appliance, and, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that act, in which the petitioner, instead of invoking, as he might, the relief accorded to him by the old Maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence but also, under Section 3 of the Employers' Liability Act, subjects himself to a reduction of damages in proportion to any contributory negligence on his part."

If the seaman must assume the burden of proving negligence, and must under Section 3 of the Employers' Liability Act subject himself to a reduction of damages in proportion to any contributory negligence on his part, there seems no reason why under Section 4 of the Employers' Liability Act he would not be held to have assumed the risk to the same extent and under the same circumstances as would a railroad employee. In an action based upon negligence in this common law sense, any question of unseaworthiness, as that term is used in the maritime law, seems unnecessary, as the common law defenses should be applicable except as modified by statute.

In its opinion the Court below makes reference to *The Osceola,* 189 U. S. 158, as supporting its statement as to the general maritime law. In *The Osceola* were stated certain definite propositions of maritime law which could be regarded as settled, but the Court did not undertake to state all the principles of maritime law governing personal injuries to seamen. Contributory negligence has always been regarded in admiralty as a defense, in part, at least, (*The Max Morris,* 137 U. S. 1) yet there is no mention of it in *The Osceola.* Assumption of risk is regarded as peculiarly applicable to seamen, in *The Iroquois,* 194 U. S. 240, and

there is likewise no mention of it in *The Osceola.* The language used by this Court is clear cut and definite and should not be construed as an attempt to cover the whole field of maritime torts in four short propositions.

Moreover, this is a situation in which *The Osceola* is not applicable. That decision was dealing solely with the rights of an injured seaman; and by the admiralty law his personal representatives, upon his death, had no cause of action against the master of the vessel. The cause of action which the seaman had, based upon unseaworthiness, died with him. The Jones Act gave to the seaman *and to his personal representative in case of his death,* a right of action for *negligence,* and it is upon that breach of duty, rather than upon unseaworthiness as defined in *The Osceola,* that this action must be predicated. As was said by this Court in *Lindgren* v. *U. S.,* 281 U. S. 38, 47:

> "Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as hereinabove stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel. The statement in *The Osceola, supra,* 175 on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. Apparently for this reason the words 'at his election,'—which appear in the first clause of Sec. 33 of the Merchant Marine Act, relating to the personal right of action of an injured seaman and, as held in *Pacific Co.* v. *Peterson, supra,* 139, gave him, as alternative measures of relief, 'an election be-

> tween the right under the new rules to recover compensatory damages for injuries caused by negligence, and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness'—were omitted from the second clause of Sec. 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And for the reasons already stated, and in the absence of any right of election, the right given the personal representative by the second clause of Sec. 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the State in which the injury was received."

The right which the respondent here asserts, then, is not one which she would have had prior to the Jones Act, by the maritime law, but is one which is asserted solely and exclusively by virtue of that enactment. *The Osceola,* as is pointed out, *supra,* is not authority for the proposition for which it is cited, and is not here applicable.

The most recent case in which this statute was before this Court for discussion is *Warner* v. *Goltra,* decided Nov. 5, 1934 (— U. S. —, 55 Sup. Ct. 46, 79 L. Ed. 8). It is there said:

> "It (referring to the statute) gives to 'any seaman' injured in the course of his employment, and in case of the death of the seaman, to his personal representatives, a cause of action similar to that given by the statutes of the United States to railroad employees."

It is submitted that the decisions of this Court, insofar as they have indicated the position of the Court upon the question now raised, reflect the opinion that the Act draws

from the common law the rules as embodied in the Federal Employers' Liability Act and the judicial construction placed upon it, and that all of these rules are thereby made a part of the maritime law, to be taken advantage of by seamen to the same extent, and under the same conditions, as railroad employees.

It is conceded by the court below and by respondent that assumption of risk is as to some accidents, at least, an available defense, both under the maritime law and the Jones Act. In *The Iroquois,* 194 U. S. 240, involving a seaman falling from aloft while trimming a sail, this Court stated the law as follows:

> "A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to happen, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risks, is peculiarly applicable to the case of seamen."

See also 24 R. C. L. 1171. And there is no conflict in the cases but that the ordinary risks usual in his employment are assumed. The *Cricket,* 71 F. (2d) 261; *Johnson* v. *U. S.,* 74 F. (2d) 703.

What risk could be more incidental and usual in the employment of a winch tender than that of becoming entangled in the line, which he alone handles, and being drawn into the winch? He knew, appreciated, and assumed the risks of slipping on the wet deck, or of becoming entangled in the line if it kinked or twisted (R. 312). It was the theory of the plaintiff's case that the clutch on the winch was worn out and would not stay in gear, requiring the use of a stick to hold the clutch lever in place; and that by reason of the presence of this stick, the lever could not be thrown out and the clutch disengaged, stopping the winch, in time to avoid the injury (R. 202). Assuming that the jury was entitled to find that the stick was in place at

the time of the accident and that the use of it rendered the winch defective, yet Anelich was an experienced fisherman and winch tender (R. 234, 306); his post, at the time the purse line was coming in and while the net was being raised, was within two or three feet of the clutch lever and the stick, if any, bracing it (R. 54, 86); the same operation had been performed one hundred and fifty times (R. 235, 293). The lever was under the joint control of himself and Brajcich, the other winch tender (R. 293, 295). If the stick was in place, he must have known that fact and further, must have realized the danger, if any, attendant upon its use. The condition was open and obvious, and brought home closer to Anelich, because of his position as winch man, than to anyone else of the vessel except, perhaps, the other winchman, Brajcich. Knowledge and appreciation of obvious dangers, which any prudent man would realize, will be presumed (*Northwestern Ry. Co.* v. *Bobo,* 290 U. S. 499.)

The testimony showed that the first that any of the crew knew of the accident was the decedent's cry of pain (R. 80, 188, 307, 308, 312, 315); the duty of looking out for his safety necessarily rested with himself, as it does with men in every occupation where machinery is involved, and to the same extent.

It is conceded by petitioners that a seaman, being bound to obey the master's orders or suffer punishment for refusal, does not assume the risk of dangerous work which he undertakes at the master's command, or the risk of injuries from defective equipment which he is ordered to use by his superiors; he has no choice but to obey and under such circumstances there can be no voluntary assumption of risk. This is merely an application, however, of the common law rule that the assumption of risk of the master's negligence must be a voluntary act by the servant with knowledge, actual or constructive, of possible danger. An

employee "is not bound to accept his own judgment, at his peril, above that of his superiors." 4 Labatt, Master and Servant, 2nd Edition, P. 3935; *Panama Ry. Co.* v. *Johnson*, 289 Fed. 964 (C. C. A. 2, 1923). The common law rule is extended in maritime situations only to the extent that the seaman's duty to obey is greater and more impelling than is the duty on a shore employee. *Holm* v. *City Service Transport Co.*, 60 F. (2d) 721, (C. C. A. 2, 1932).

Under the maritime law, then, assumption of risk of obvious and open dangers has always been held an available defense to the master or owner of the vessel, unless it is shown that the seaman did not voluntarily assume the risk but was ordered to use the appliance or equipment which proved defective. *The Serapis*, 51 Fed. 91 (C. C. A. 4, 1892); *The Saratoga*, 94 Fed. 221 (C. C. A. 2, 1899); *Cunard S. S. Co.* v. *Smith*, 255 Fed. 846 (C. C. A. 2, 1918); *The Maharajah*, 40 Fed. 784 (D. C., N. Y. 1889); *The Luckenbach*, 53 Fed. 652 (D. C., N. Y. 1892); *The Scandinavia*, 156 Fed. 403 (D. C., Md. 1907) and See *Globe Steamship Co.* v. *Moss*, 245 Fed. 54 (C. C. A. 6, 1917). In fact, as was said by the Washington Court in *McPherson* v. *Twin Harbor Stevedoring & Towing Co.*, 139 Wash. 61, 245 Pac. 747, (1926):

> "The fact is that the rule of liability in admiralty and common law is the same with reference to a safe place to work and the assumption of risk."

Prior to the Jones Act also it was held that when acting in obedience to a direct order, a seaman does not assume the risk of any defective condition in equipment. *LaFourche Packet Co.* v. *Henderson*, 94 Fed. 871 (C. C. A. 5, 1899); *The Colusa*, 248 Fed. 21 (C. C. A. 9, 1918); *Cricket S. S. Co.* v. *Parry*, 263 Fed. 523 (C. C. A. 2, 1930). *Eldridge* v. *Atlas S. S. Co.*, 134 N. Y. 187, 32 N. E. 66 (1892).

Since the passage of the Jones Act, the majority of the courts passing on the question have applied the common law defense of assumption of risk to actions brought by seamen for injuries received from defective appliances or poor working conditions. *Southern Ry. Co.* v. *Hermans*, 44 F. (2d) 356 (C. C. A. 4, 1930); *M. J. McCahan Sugar, etc., Co.* v. *Stoffel*, 41 F. (2d) 651 (C. C. A. 3, 1930); *The Calvert*, 51 F. (2d) 494 (C. C. A. 4, 1931); *The Richelieu*, 48 F. (2d) 497 (C. C. A. 4, 1931); *Stevens* v. *O'Brien & Co.*, 62 F. (2d) 633 (C. C. A. Mass. 1933); *Peterson* v. *Sanford Tug Co.*, 28 F. (2d) 283 (D. C., N. Y. 1928); *The Ipswich*, 46 F. (2d) 136 (D. C., Md. 1930); *The Zealand*, 49 F. (2d) 781 (D. C., N. Y. 1931); *Russell* v. *Marquette Ry. Co.*, 245 Mich. 649, 223 N. W. 230 (1930) Cert. Den. 279 U. S. 864; *Patterson* v. *Ceveland Cliffs Iron Co.*, 27 Ohio App. 316, 174 N. E. 592 (1930).

Typical of these decisions are the following excerpts:

> (Referring to the Jones and Liability Acts:) "The Supreme Court has held that Congress, by eliminating the defense of assumption of risk in the cases indicated, quite plainly intended that in all other cases such assumption should have its former effect as a complete bar to the action. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 508. There is no claim in this case of violation of any statute and hence the ordinary common law rule must be given effect. In the cited case the Supreme Court defined the rule and held that it applied in cases under the Federal Employers' Liability Act, even though the master had been guilty of negligence." *Southern Ry. Co.* v. *Hermans*, 44 F. (2d) 366.
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> "It is, of course, the law that the employer exercise due care to furnish a safe place to work and that a breach of this duty ordinarily gives the injured employee a right of action, but it is equally the law, laid down by the Supreme Court of the United States, that if the employer neglects this duty and the defect and

risk involved in that neglect are obvious to an ordinarily prudent person under the circumstances, and would be observed and appreciated by such person, he assumes the risk, even though it flows from the neglect of duty. * * * He was not acting under the compulsion of an order from a superior officer, which, under some circumstances, prevents the application of the doctrine of assumption of risk." *The Ipswich*, 46 F. (2d) 136.

If, however, the seaman is ordered to use the appliance it has been held under the Jones Act, as it was prior to that enactment, that he does not assume the risk. *Panama R. R. Co.* v. *Johnson*, 289 Fed. 964 (C. C. A. 2, 1923); *Zinnel* v. *U. S. etc. Corp.* 10 F. (2d) 47 (C C. A. 2, 1925); *Coast S. S. Co.* v. *Brady*, 8 F. (2d) 16 (C. C. A. 5, 1925); *U. S. etc. Corp.* v. *O'Shea*, 5 F. (2d) 123 (App. D. C. 1925); *Masjulis* v. *U. S. etc. Corp.* 31 F. (2d) 284 (C. C. A. 2, 1929); *U. S.* v. *Boykin*, 49 F. (2d) 762 (C. C. A. 5, 1931); *Hanson* v. *Luckenbach S. S. Co.*, 65 F. (2d) 467 (C. C. A. 2, 1933); *Johnson* v. *U. S.*, 7 F. Sup. 133 (D. C. N. Y. 1934); *The Mangore*, 1 Fed. Sup. 138 (D. C., Md. 1932); *Lejune* v. *General Pet. Corp.*, 72 Cal. App. Dec. 50, 18 Pac. (2d) 429 (1932); *States S. S. Co.* v. *Berglann*, 41 F. (2d) 456 (Cert. Den. 282 U. S. 868; C. C. A. 9, 1930).

It must be noted that in many of the cases just cited there is a broad statement to the effect that risks of unseaworthiness or of defective appliances cannot be assumed by a seaman; *the facts in each case show that the use made was required by an order given*, and in many of the cases it is recognized that the controlling factor, in holding that the defense does not apply, is the coercion or compelling force upon the seaman by the command, removing all possibility of voluntary assumption of risk.

As opposed to these cases are the following: *Grimberg* v. *Admiral Oriental S. S. Line*, 300 Fed. 619 (D. C. Wn. 1924);

Pittsburgh S. S. Co. v. *Palo*, 64 F. (2d) 198 (C. C. A. 3, 1933); *Storgaard* v. *France & Canada S. S. Co.*, 263 Fed. 545 (C. C. A. 2, 1920); *Grant* v. *U. S. etc. Corp.*, 22 F. (2d) 488 (C. C. A. 2, 1927); *Howarth* v. *U. S. etc. Corp.*, 24 F. (2d) 374 (C. C. A. 2, 1928); and *Ives* v. *U. S.*, 58 F. (2d) 201 (C. C. A. 2, 1932).

The *Grant* case is indicative of these decisions. Quoting:

> "In respect to the defense of assumption of risk, no more need be said than that a ship owner cannot avoid liability for injuries to a seaman by a defective appliance on the grounds that the seaman knew of the defect."

The only cases cited in support of that statement are cases in which the seamen were injured *while obeying an order to use the defective appliance.* In the *Grimberg* case there was no showing that the seaman knew, or had any way of knowing, of the defect causing his injuries, and therefore the doctrine would not have been applicable in any case. In the *Pittsburgh S. S. Co.* case there was no evidence of negligence on the part of the defendant, and the court, merely by way of dicta, recognized the divergent lines of authority and chose to approve the minority rule.

The other four cases all arose in the Second Circuit Court of Appeals, and in the most recent case from that Circuit, it was held that even as to an unseaworthy condition—failure to provide lifelines during a storm—caused by the negligence of the ship and master, the seaman assumed the risk if he voluntarily ventured on deck and attempted to cross the deck in a storm while not acting under any direct order or command. *Johnson* v. *U. S.*, 74 F. (2d) 703 (C. C. A. 2, 1935). The District Court, which had held that the risk was not assumed because it was due to a negligent condition, rendering the vessel unseaworthy, was reversed and the libel was dismissed. (District Court

decision, 7 Fed. Supp. 133.) See further as to the extent to which the Second Circuit has retracted from the broad rule as stated in the *Grant* case, *Holm* v. *City Service Transport Co.*, 60 F. (2d) 721; *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing & Transport Co.*, 68 F. (2d) 11. The importance of this question is shown by the number of cases in which it has been raised and the diversity of the holdings upon it.

There are these further facts which indicate that under the rule of any jurisdiction, the defense of assumption of risk was available as against this injury received by Anelich. Anelich, while he was concededly a seaman in the sense in which that word is used in the Jones Act, and was thus entitled to the benefits of that Act, was not a seaman in the ordinary sense of the word; he was not subject to disciplinary measures for disobedience; he could quit work when he wished and receive his earned pay; the buyers came alongside at least daily and the boat laid along shore each evening; once a week the boat came into port for a day's holiday; he could disobey orders with no more penalty than any shore employee, and was free to leave the vessel at any time without forfeiture of any of the money he had earned. (R. 326, 233). Under these undisputed facts, any of the Circuits would hold that such an employee assumed risks under the same conditions as a railroad employee. The reason for any distinction is gone, as the controlling element of coercion and enforceable obedience is absent, and any act on the part of Anelich was as voluntary as that of a shore worker. In two recent cases the Second Circuit Court of Appeals has held that members of the crew of tugboats, who are seamen within the sense of the Jones Act, are yet in the class of stevedoring or longshoremen and assume all obvious risks quite as though they were injured on shore. *Skolar* v.

Lehigh Valley Ry. Co., 60 Fed. 893; *Scheffler* v. *Moran Towing & Transport Co.*, 68 F. (2d) 11. As was said in the *Skolar* case,

> "Where a seaman is ordered to use a patently defective appliance or to perform an obviously dangerous act on shipboard, he is not held to have assumed the risk because his duty to obey orders overrides the consent ordinarily implied from knowledge of the danger. See a discussion in *Holm* v. *City Service Transport* Co., 60 F. (2d) 721, decided by this Court July 18, 1932. The case at bar does not fall within the reason of the rule. Here the plaintiff was an extra fireman, employed at an hourly wage with the usual tour of eight hours a day on different tugs of the defendant. He was not supplied with a defective appliance nor ordered to perform a dangerous duty which fell to his lot rather than some other member of the crew because of a superior officer's selection. The danger arose from the mechanical design and construction of the fire room. With this he was perfectly familiar and voluntarily took employment under those conditions time after time on at least fifty prior occasions. He did not live on board but at his home in Jersey City; nor had he signed on for any definite voyage of this harbor tug, nor been employed to work on her rather than upon some other of defendant's vessels. Had he refused to go aboard the evening of November 5 when he sought the Auburn out at the dock, it seems extremely doubtful as to whether he would have been subject to the disciplinary penalties of the ordinary seaman. Under such circumstances, an analogy of a stevedore is more persuasive than that of a seaman in determining whether the doctrine of assumption of risk should be applicable."

So also in the *Scheffler* case, speaking of the crew of a tugboat:

> "Such men are in the position of longshoremen or other casual workers on the water (*Skolar* v. *Lehigh*

R. R. Co., 60 F. (2d) 893 (C. C. A. 2); *The Scandinavia* (D. C. 156 F. 403), who assume all obvious risks quite as though they were injured on shore.

"The libellant knew when the tug left that morning that he would be compelled to handle the lines for the absent deck hand, as he had done before. So far as this exposed him to any greater danger than his usual place aft, he acquiesced in the risk. This fulfills all the elements of an assumption of risk and prevents his recovery."

It has been held in many cases that a longshoreman or stevedore, although entitled to seek the benefits of the Jones Act, assumes the risk of injury from defective equipment and the same rules are applied to an action brought by him as are applied to an action brought by a railroad employee. *O'Brien* v. *Luckenbach S. S. Co.*, 293 Fed. 170 (C. C. A. 2, 1923); *DeLuca* v. *Shephard S. S. Co. Inc.*, 65 F. (2d) 566 (C. C. A. 2, 1933); *Lloyd* v. *Hogan & Sons*, 219 N. Y. S. 750, 755; *Long* v. *Silverline*, 48 F. (2d) 15; *The Hindustan*, 37 F. (2d) 932, Aff. 44 F. (2d) 1015; *Yaconi* v. *Brady & Gioe Inc.*, 246 N. Y. 300, 158 N. E. 876; *Jeffries* v. *DeHart*, 102 Fed. 765 (C. C. A. 3, 1900).

Prior to the decision in the instant case, the Washington Supreme Court had, in many cases involving both seamen and stevedores, held that under the Jones Act the defense of assumption of risk was available, as it was before the Jones Act was passed, in cases of maritime torts. *Lundgren* v. *Pacific Coast S. S. Co.*, 103 Wash. 81, 173 Pac. 1023; *Hamre* v. *Rothschild & Co.*, 136 Wash. 522, 240 Pac. 909 (1925); *Kahlstrom* v. *International Stevedoring Co.*, 141 Wash. 374, 250 Pac. 287 (1926); *McGinn* v. *North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113, (1928); *Schotis* v. *North Coast Stevedoring Co.*, 163 Wash. 305, 320, 1 Pac. (2) 221 (1931), and cases cited.

In the instant case the Washington Supreme Court decided a material and important question arising under the

act of Congress herein termed the Jones Act, involving a matter within the exclusive control of that Act, in a way clearly in conflict with the applicable decisions of the Federal Courts and with its own prior decisions. Because of this erroneous construction of a Federal statute, and because this is a question of first impression in this Court and one which is highly important to all maritime workers to have definitely settled, it is urged that this Court should take jurisdiction to review and correct the decision of the Supreme Court of the State of Washington.

B.

1. Upon this point the evidence is undisputed and the principles of law are definitely settled. The question raised and the pertinent authorities are stated in the petition under heading B, II, and in the interests of brevity will not be repeated at this point. The question is one merely of whether an inference based on disputed facts can be drawn in the face of direct and positive disinterested testimony.

2. The duty which the maritime law places upon the master and owners of a vessel to furnish proper medical attendance and treatment has been stated by this Court in *The Iroquois,* 194 U. S. 240, as follows:

> "The duty to provide proper medical attendance and treatment for seamen falling ill or suffering injuries while in the service of a ship has been imposed upon the ship owners of all maritime nations. * * * What is the measure of the master's obligation in cases where a seaman is severely injured while the ship is at sea has been made the subject of discussion in several cases; but each depends so largely upon its own particular facts that the rule laid down in one may afford little or no aid in determining the matter, depending upon a different state of facts. * * * Each case must depend upon its own circumstances, having

> reference to the seriousness of the injuries, the care that could be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the ship owner, the direction of the wind and the probability of its continuance on the same direction, and the fact of whether a surgeon is likely to be found with competent skill to take charge of the case. * * * With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman of the geography and resources of the country. * * * Seafaring life is dangerous, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risk is peculiarly applicable to the case of seamen."

The Iroquois is without doubt the leading case upon the question and as is said therein, reference to other cases is of little value because of the differing facts upon which the decision in each case must depend. All decisions agree, however, that the master is held only to the exercise of reasonable judgment under the circumstances and if that judgment is conscientiously exercised, the master and vessel are not responsible. *The Vanderduyn,* 261 Fed. 887 (C. C. A. 2, 1919); *The Governor,* 230 Fed. 857 (D. C. 1915).

Measured by the standard of care as set forth in these cases, certainly it cannot be said that on the undisputed evidence set forth, the masters and owner of the "Arizona" should be held negligent in their treatment of the wounded man or in the course of conduct followed in securing medical aid for him. It was asserted that the injured man should have been taken to one of several other ports named; it clearly appeared from the evidence that Friday Harbor was the nearest port at which medical attendance could be obtained (R. 330-332) and as was said in *The Iroquois,* the mere fact that plaintiff named several possible ports indi-

cates that there was no one other course which the jury could find as being the only reasonable course under the circumstances. It was also asserted that airplane service should have been called from Seattle, and considerable evidence was allowed as to available airplane service (R. 167 *et seq.*). Not only did the evidence show, however, that the defendants did not know of the available airplane service and had never heard of it (R. 327), but it also appeared without dispute that the earliest time at which a telephone could be reached was 9:40, more than an hour after the accident (R. 279, 281) and that a round trip from Seattle to Friday Harbor could not have been made in less than two hours actual flying time (R. 178). It clearly appears, therefore, that Mr. Anelich received competent medical attention by Dr. Sturdevant at Friday Harbor at 10:30, more than an hour before he could have received such attention had the defendants followed any other course suggested by the respondent here; and that such treatment as Dr. Sturdevant gave him was the standard treatment to be given at the time a doctor first sees such a wound; it is then necessary to allow the patient to rest for a considerable period to recover from stock before any operative measures are taken (R. 22, 166).

The master and crew of the "Arizona" made no effort to cleanse or repair the wound other than to apply a tourniquet to halt bleeding. Had they attempted to clean up the wound, without having special training and with only a small first aid kit, it appeared that the likelihood of infection and greater shock would have been increased (R. 269, 274, 260, 265).

Delayed treatment and medical care is one of the risks a seaman assumes, he expects and assumes that ordinary methods will be utilized by his employer in getting him to medical attention.

It clearly appears from the evidence that the defendants exercised reasonable judgment under the circumstances, and that as a matter of fact, and of law the course which they followed was the reasonable and proper course under the circumstances. Certainly there is no evidence of negligence sufficient to sustain a verdict against them on the basis of careless treatment and judgment on the part of the master of the vessel, under the rules as laid down by this Court in *The Iroquois.*

4. It has been at all times contended by petitioners that even if it be assumed that the fishermen should have attempted to cleanse and repair such a wound, or should have known of and called airplane service, yet there was no evidence that the treatment actually given was a proximate cause of the septicemia resulting in death. The testimony of each of the four doctors testifying in the case was that in his opinion the organisms which resulted in septicemia causing death entered the wound at the time of the original injury (R. 160, 162, 165, 262, 267, 270, 273). It is undisputed that from such a wound it is extremely likely that septicemia will result under the best treatment—that septicemia was the more probable result of the injury Anelich received, even had he been hospitalized immediately (R. 267, 269).

With the uncontradicted evidence herein set forth, the jury could not do other than speculate as to whether the negligent treatment, if any, was the proximate cause of septicemia, resulting in the death of Anelich. The Circuit Court of Appeals of the Second Circuit in *Cortes* v. *Baltimore Insular Lines,* 66 F. (2d) 526, had before it a very similar question, it appearing that the plaintiff's decedent in that case had contracted pneumonia which might have been any one of four types, one of which averaged a fatality of from 70% to 90%. His treatment on board the ship was

careless in the extreme. The courts reversed the ruling of the District Court in allowing the case to go to the jury as follows:

> "Granting that the jury could have found negligence in treatment, was there evidence from which they could have found that such negligence was the cause of death? We think not. * * * If he had a disease so fatal that the chance of recovery was only one to three out of ten, even with the best of treatment, it seems to us pure speculation on the part of the jury to find that the failure to land him at intermediate port or to get him to a hospital more promptly after arrival, or the failure to give him more careful treatment on board ship, was the cause of his death. * * * (The Court pointed out that doctors testified that his chance of recovery would have been increased by reasonable medical treatment on board.) But that is scarcely equivalent to testimony that with reasonable certainty the defendant's neglect can be said to have caused the seaman's death. * * *
>
> "Because on this record a verdict for the plaintiff would be purely speculative, we think there was error in submitting the case to the jury. The causal connection between the defendant's breach of duty and the resulting injury or death must not be left to mere conjecture. *Thorkeldson* v. *Nicholson,* 154 Minn. 106, 191, N. W. 269, 220; *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478, 46 S. C. 564, 70 L. E. 10, 11; *Ketterer* v. *Armour & Co.,* 247 F. 921, 931, L. R. A. 1918 D. 798 (C. C. A. 2); *N. Y. Cent. R. Co.* v. *Grimstad,* 264 Fed. 334 (C. C. A. 2); cf *Harris* v. *Penn. R. Co.,* 50 F. (2d) 866 (C. C. A. 4)."

The fundamental law as stated in the *Cortes* case, that verdicts cannot rest on mere conjecture and that causal connection must be shown between negligence and injury, is well established both by the decisions of this Court, *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 474, 478, and by the prior decisions of the Supreme Court of Washington.

Huffine v. *Alvin Investment Co.*, 126 Wash. 490, 218 Pac. 194; *Peterson* v. *Great Northern Ry. Co.*, 166 Wash. 538, 7 Pac. (2d) 296. The only case which in any degree supports the position of the respondent and of the court below is the subsequent decision of the District Court in the *Cortes* case upon the retrial (6 Fed. Supp. 604). The principles there stated stand alone and appear in clear conflict with the opinion of the Circuit Court, and with the decisions of this Court. In the instant case, as has been pointed out, all medical testimony agreed that in all probability the wound became infected at the time of the original injury; and it was shown that in wounds such as this septicemia develops in more than half of the cases. If such a percentage arises from the average case in which medical attention is not delayed for any length of time, what would be the percentage under circumstances in which dirty clothing is ground into the wound and if enforced delay of two hours exists before medical attention can be reached? Under such circumstances, the jury can do no more than guess when it states that failure to cleanse the wound on board the vessel, or failure to use an airplane, caused the blood poisoning which resulted in the death of Anelich. Each of the doctors testified that in their opinion the infection got into and was carried through the blood stream at the time of the accident, and even had hospitalization followed *immediately*, it was entirely possible that death would have ensued.

There is absolutely no testimony that negligent treatment, if any, on the part of the defendants can be said *with reasonable certainty* to have been a proximate cause of the decedent's death; on that phase the jury had grounds only for speculation and conjecture, and the court below was in error in holding that a jury question was presented (R. 22).

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors of the Supreme Court of Washington heretofore specified may be corrected and justice done, as of right should be, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Washington and finally reverse it.

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